No. 84-1851

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IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1985

EDGAR HARDIN GILLOCK,

PETITIONER

vs.

UNITED STATES OF AMERICA,

RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY
TO BRIEF OF THE UNITED STATES

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A. QUESTIONS PRESENTED FOR REVIEW

(1) Whether the Sixth Circuit's finding of misjoinder requires reversal of defendant Gillock's conviction.

(2) Whether the Sixth Circuit's decision in the case before this Court can be reconciled with the Eighth Circuit's ruling in United States v. Rabbit, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979) and, if not, which ruling is correct.

(3) Whether reversal of a conspiracy conviction due to a fatal variance between the indictment and the proof offered at trial requires reversal of remaining convictions which were based in large part on alleged co-conspirators' hearsay statements erroneously admitted under FRE 801(d)(2)(E).

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v.

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ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
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PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES

COUNTER-STATEMENT OF THE CASE

At page 2 of the Brief for the United States, the government contends that:

> The evidence at trial showed that petitioner, a former Tennessee state senator, used his influence to assist in the sale of Honeywell computers to state and local governments in exchange for payments in excess of $150,000.

This statement is incorrect. The evidence at trial showed that Gillock had no influence on either the sale to the Tennessee Department of Employment Security or the sale to Shelby County, Tennessee. Although Gillock was a state senator at the time of the sale to the Department, he had no authority to approve or disapprove the sale. He sat on no legislative committee reviewing the sale. He exercised no power to affect the sale one way or another. No witnesses for the government testified that Gillock influenced the sale. On the contrary, David Ewing Jean, Sr., the

purchasing agent for the State, testified Gillock did not influence the contract in any way. At most, Gillock knew how Tennessee state government was structured and was more familiar with the purchasing process than a layman unacquainted with Tennessee govern-

ment.

At page 3 of the Brief for the United States, the government contends:

> Petitioner agreed with his co-defendants and Camarda to use his influence to convince the county to purchase an upgraded Honeywell computer system.

This statement is misleading. In the sale to Shelby County, again, Gillock exercised no influence. The County Mayor and Horace E. Hall, Administrator of the Shelby County Computer Center, testified that Gillock could not and did not influence the sale. He was not an elected or appointed official in Shelby County government. He exercised no official power to affect the sale one way or another. None of the witnesses for the government testified that Gillock influenced

the sale. In both the sale to the State and the sale to the County, witnesses from the State and County governments and from Honeywell testified that the State and County received full value for their money.

ARGUMENT

1. The misjoinder issue. - At page 4 of the Brief of the United States, the government acknowledges that the question presented in Gillock's petition is identical to the issue presented in United States v. Lane, cert. granted, No. 84-744 (Feb. 19, 1985). Gillock respectfully requests permission to submit a brief on the issue of misjoinder.

At page 5 of the Brief for the United States, the government rejects the argument that Gillock was prejudicially misjoined with co-defendants Bibby and Ayers in light of the reversal of his conspiracy conviction. The government relies upon Schaffer v. United States, 362 U.S. 511, 513-517 (1960), for this argument. Schaffer, however, differs from the case before this Court.

In Schaffer, the indictment in question contained four (4) counts. Count 1

charged two (2) Schaffers and three (3) Stracuzzas with transporting stolen goods from New York to Pennsylvania. Count 2 charged Marco and the Stracuzzas with moving stolen goods from New York to West Virginia. Count 3 charged Karp and the Stracuzzas with moving stolen goods from New York to Massachusetts. Count 4 charged all of the parties with conspiracy to commit the substantive offenses contained in the first three (3) counts. At the close of the government's proof, the trial court dismissed the conspiracy count for a failure of proof. The trial court submitted the substantive counts to the jury on a detailed charge. On appeal, the defendants argued that prejudice existed by reason of the joint trial. The Court of Appeals and the Supreme Court upheld the convictions. Id. at 513-514.

In Schaffer, the Supreme Court addressed the question of "whether, after dismissal of the conspiracy count before

submission of the cases to the jury, a severance should have been ordered under Rule 14 of the Federal Rules of Criminal Procedure." Id. at 514. The Court held that under the circumstances there was no prejudice. According to the majority opinion, the government carefully compartmentalized the proof as to each petitioner; moreover, upon submission to the jury the trial court "meticulously set out separately the evidence as to each of the petitioners and admonished the jury that they were 'not to take into consideration any proof against one defendant and apply it by inference or otherwise to any other defendant.'" Id. at 515.

In the instant case, in contrast, the trial court did not dismiss the conspiracy county against Gillock. Gillock did not have the benefit of a detailed and careful jury charge. In contrast, it is important to note that at the very start of the evidence, counsel for Gillock moved the

Court to require the government to structure its proof so as to avoid this problem but said motion was overruled. After the remand by the Court of Appeals for the requisite Enright finding and the trial court's continued insistence on Gillock's participation in an alleged conspiracy, the Sixth Circuit reversed Gillock's conspiracy conviction. It should be noted that four (4) Justices dissented from the Schaffer opinion and would have reversed the judgments and remanded the causes for new trials. Id. at 518-524.

Misjoinder in the case at bar forced counsel for Gillock to try collateral issues unrelated to any actions on his part. As a result, joinder with Bibby and Ayers was prejudicial to Gillock on all counts. Such misjoinder can only be remedied by reversal of all of Gillock's convictions.

2. The conflict with United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979). - At

pages 5-6 of the Brief for the United States, the government attempts to distinguish Rabbitt from the case before this Court. In Rabbitt, the defendant Missouri state legislator's prosecution for mail fraud rested upon the theory that he defrauded the citizens of Missouri; in the case before this Court, the government argues, petitioner was charged with defrauding Honeywell not the citizens of Tennessee.

This assumption is correct only to a point. Count I, the conspiracy court, charged the three (3) defendants and unnamed co-conspirators with agreeing to defraud Honeywell. (Pet. 16). The Court of Appeals reversed Gillock's conspiracy conviction. Counts II - IX charged the defendants with violating the mail and wire fraud statutes through a scheme to defraud Honeywell, the State and its citizens, and the County and its citizens. (Pet. 17-19).

The Rabbitt case tested the extent to which the government could use the mail fraud statute to prosecute a public official for fraud. Because there was no evidence in the Rabbitt case to the effect that the defendant's actions in assisting the architectural firm resulted in inferior work, greater expense or tangible loss to the state or its citizens, the Eighth Circuit reversed his convictions on the Berger-Field mail fraud counts.

The Sixth Circuit should have reversed all of Gillock's mail and wire fraud convictions. The Court of Appeals determined that the main conspiracy in this case was the conspiracy to defraud Honeywell of the honest, faithful and loyal performance of its employees. The core of this conspiracy was the arrangement between Bibby, Ayers, and Camarda to split profits. (Pet. App. 10-11). The Court further determined:

The record does not show

> any evidence that Gillock ever knew about the profit-splitting agreement between Camarda, Bibby and Ayers.

(Pet. App. 11). The Court reversed Gillock's conspiracy conviction and one wire fraud conviction but let the remaining convictions stand. Not only is this decision internally inconsistent, but it also conflicts with the Eighth Circuit's ruling in Rabbitt.

At pages 6-7 of the Brief for the United States, the government further attempts to distinguish the holding in Rabbitt from the holding in the case before this Court with respect to alleged Hobbs Act violations. According to the government, in Rabbitt the extorted party did not possess a reasonable belief in the Missouri state legislator's powers. In the instant case, however, Gillock's actions were allegedly sufficient to create a reasonable belief that he could influence the Shelby County sale.

Comparison of the two decisions, however, negates the government's attempt to distinguish Rabbitt from Gillock. According to the Rabbitt opinion, "[t]he principals of the Berger-Field firm testified they sought Rabbitt's political influence as a legislator." 583 F.2d at 1021. At the same time, the record lacked substantial evidence of fear of economic injury to the architects in Rabbitt. The firm did not believe that contracts could not be acquired without Rabbitt's help. Similarly, in the case before this Court, Honeywell had secured contracts in Tennessee without Gillock's intervention. For example, in 1975, Shelby County purchased and installed a Honeywell computer system. (Pet. 15). The prosecution against Gillock resulted from the 1978 purchase from Honeywell to update the system.

The factual background in the Rabbitt and Gillock cases are, in all material respects, identical. The results

achieved, however, are opposite. District Courts, not only in the Sixth and Eighth Circuits but also throughout the country, need clarification and instructions from the Supreme Court on the application of the mail and wire fraud statutes and the Hobbs Act in the prosecution of public officials.

3. Erroneous admission of alleged co-conspirator statements. - With reference to the admission of co-conspirators' evidence not being erroneous because the Court of Appeals found multiple conspiracies (Pet. App. 13) is to overlook and ignore the fact that Gillock was charged with one conspiracy and one only.

A defendant has to be charged with an offense in order for evidence of any kind to be admitted. For the appellate court to hold that Gillock's conviction of the conspiracy charge must be reversed and at the same time say it was proper to allow the alleged co-conspirators' testimony as evidence because that Court had itself found

evidence of conspiracy not charged should not require any legal citation.

Respectfully submitted,

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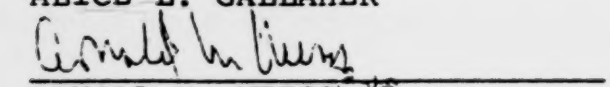
BY: 
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August, 1985

CERTIFICATE OF SERVICE

I, Arnold M. Weiss, Attorney for Petitioner, hereby certify that I have this 1 day of August, 1985, pursuant to Rule 28 of the Supreme Court Rules, caused to be served upon The Honorable W. Hickman Ewing, United States Attorney, Federal Building Memphis, Tennessee 38103; Mr. Henry L. Klein, Attorney for Allen Bibby, 770 Estate, Memphis, Tennessee 38119; Mr. Andrew Ekonomou, Attorney for A. Arthur Ayers, Suite 515, Rhodes-Haverty Bldg., 134 Peachtree Street, N.W., Atlanta, Georgia 30303; and Mr. John Hehman, Clerk, United States Court of Appeals for the Sixth Circuit, U.S. Post Office and Courthouse Building, Cincinnati, Ohio 45202; Solicitor General, Department of Justice, Washington, D. C. 20530; The Honorable Robert M. McRae, Judge, United States District Court for the Western District of Tennessee 38103; copies of the foregoing Petitioner's Reply to Brief of the

United States, filed by Edgar Hardin Gillock by placing copies of the same in the United States mail, properly addressed, and with sufficient postage affixed thereto.

Arnold M. Weiss